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No. .....

79-1994

In the Supreme Court of the United States

October Term, 1979

PHILLIP R. BALANO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

TO: The Honorable Chief Justice and Associate Justices of the United States Supreme Court:

The petitioner, Phillip R. Balano, prays that a writ certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit sustaining the conviction of the petitioner as an accessory after the fact to interstate transportation of stolen goods by the use of grand jury testimony of a convicted participant in the crime who refused to testify at trial.

OPINIONS BELOW

The opinion of the United States Court of Appeals, as yet unreported, appears as Appendix A, the Court's Order denying the petitioner's Petition for Rehearing En Banc on May 20, 1980, is attached as Appendix B, *infra.* The United States Court of Appeals for the Tenth Circuit affirmed the judgment of the United States District Court for the District of Kansas. Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on December 18, 1979. See Appendix A, pp. A1-18, *infra.* The petitioner's Petition for Rehearing and Suggestions for Rehearing En Banc was denied on May 20, 1980. This Petition for Certiorari being filed less than thirty (30) days thereafter. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The petitioner was convicted by a jury of being an accessory after the fact to the interstate transportation of stolen property in violation of 18 U.S.C. §3 because he provided a razor and a place to shave to an individual who had previously robbed a coin shop. At the trial, the prosecution was permitted to introduce grand jury testimony of one of the robbers against the petitioner and such evidence was the primary basis for the conviction. The trial court and the Court of Appeals found that the petitioner had waived any objection based upon his constitutional right of confrontation. The questions thereby arising are:

1. Whether the government may introduce the grand jury testimony of a crucial witness who has refused to testify at trial on the basis that the defendant has waived his Sixth Amendment right to confrontation by coercing the witness not to testify when the witness' sworn grand jury testimony refutes the existence of the threat that served as the basis for the finding of waiver and the witness' unsolicited letter to the defendant's counsel corroborating that the threat was nonexistent?

2. Whether a defendant may be convicted as an accessory after the fact without any knowledge of the underlying crime and upon proof that his entire involvement with the crime was in providing a razor and a place to shave a light mustache to one of the perpetrators while the perpetrators were in the process of escaping from the authorities?

3. Whether double jeopardy prohibits the prosecution from trying a criminal defendant a second time after a mistrial in the first trial when the prosecution failed to present adequate evidence, as a matter of law, in the first trial?

4. Whether an indictment under 18 U.S.C. §3 must indicate that the underlying offense occurred within the applicable period prescribed by the statute of limitations?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .

18 U.S.C. §2.

Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. §3.

Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.

Except as otherwise expressly provided by any Act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maximum term of imprisonment or fined not more than one-half the maximum fine prescribed for the punishment of the principal, or both; or if the principal is punishable by death, the accessory shall be imprisoned not more than ten years.

STATEMENT OF FACTS

This is an appeal from the second trial in this case. The first resulted in a hung jury, the second in a conviction finding the defendant guilty of one count of accessory after the fact to interstate transportation of stolen goods; the Trial Court, at the conclusion of the first trial, sustaining the defendant Balano and Rosen's Motion for Judgment of Acquittal to Count III of the Indictment alleging violations of 18 U.S.C. §2314 and 18 U.S.C. §2. (R.Vol. II, 352.)

Count II of the indictment alleged that the defendant and one Saul Rosen, knowing that two individuals, Dom-

inick J. Carullo and James E. Johnston, had previously robbed a coin shop and that the two had transported coins stolen from the shop in interstate commerce, provided "new clothing to replace the clothing used in the above mentioned crime, did provide Dominick J. Carullo shaving equipment and lavatory facilities in order for the said Carullo to shave off his mustache and beard, and did provide Dominick J. Carullo and James E. Johnston, a/k/a Sonny, a suitcase in which to hide the stolen gold coins, all for the purpose of aiding and assisting said Dominick J. Carullo and James E. Johnston, a/k/a Sonny, to escape apprehension for trial and punishment." (R.Vol. I, 2.)[1]

Count I alleged that one Sam Bernstein aided and abetted Carullo and Johnston to rob the coin shop. (R.Vol. I, 1.) Carullo was also charged in a separate indictment with interstate transportation of stolen property. (R.Vol. V, 291.) Carullo pleaded guilty and was sentenced to five years in prison. *Id.* He was also granted immunity for his testimony before the grand jury as to the crime in question. (R.Vol. V, 292.) James Johnston, the other robber, also pleaded guilty and was sentenced to five years in prison. (R.Vol. IV, 79.) After the first trial in this matter, Count II of the indictment against Rosen was dismissed because of his death. (R.Vol. III, 350.) At the time of trial, the case against Bernstein had been severed from that against the defendant Balano. (R.Vol. VI, 425.)

The robbery occurred on April 13, 1974. (R.Vol. III, 52-54.) The indictment was not issued until April 7, 1976. (R.Vol. I, 3.) The initial trial in the case was conducted in October 1976. (R.Vol. II, 352.) At the close of all the evidence in the case, the defendant Balano filed a motion for judgment of acquittal as to Count II, which was

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1. References are to pages of the record before the Court of Appeals.

denied. (R.Vol. II, 352.) Ten days after the mistrial, the defendant filed a renewed motion for judgment of acquittal, which was denied on February 3, 1977. (R.Vol. II, 352.) Thereafter, the defendant was tried a second time, beginning on December 13, 1977. (R.Vol. II, 355.) The jury returned a verdict of guilty at the close of the trial, on December 19, 1977. (R.Vol. II, 355.) Balano made a motion for judgment of acquittal at the close of the evidence in the case and renewed that motion on January 9, 1978. (R.Vol. II, 355.) The trial court denied the motion on both occasions. (R.Vol. II, 355.) On March 15, 1978, the defendant was sentenced to pay a fine of $2,500 and five years imprisonment, which was suspended. This appeal followed. (R.Vol. II, 328.)

The defendant was a partner with Saul Rosen in a business known as Sol's Loan Office in Kansas City, Kansas. (R.Vol. VI, 339.) The prosecution claims that the defendant unlawfully assisted the two individuals who robbed the Mission Coin Shop on April 13, 1974 and later that day came to the loan office in an attempt to sell the coins stolen in the robbery. (R.Vol. I, 2.) James E. Johnston, one of the two robbers, testified that one Samuel Bernstein initially suggested the robbery when Johnston and Carullo visited Sol's Loan Office for the purpose of buying a shotgun. (R.Vol. IV, 82-83.) Bernstein was an employee of the loan shop at the time. (R.Vol. IV, 84.) But the prosecution was unable to show that Balano was present at the time of the conversation. (R.Vol. IV, 86.) Moreover, the prosecution's evidence showed that Bernstein had instructed Carullo only to contact him personally if they robbed the coin shop. (R.Vol. IV, 87.)

Thereafter, Carullo and Johnston "cased" the coin shop and then robbed it. (R.Vol. IV, 88-92.) The owner of the shop described Carullo as very heavyset with long black hair. (R.Vol. IV, 51.) The owner of the coin shop

also testified that Carullo had no mustache to speak of and that it was sporadic "like baby black spots." (R.Vol. IV, 52.)

After the robbery, which occurred in Johnson County, Kansas, the robbers drove across the state line into Kansas City, Missouri. (R.Vol. IV, 92-94.) They parked the get-away car in Missouri and then hailed a cab, which took them to a location on the Kansas side near to Sol's Loan Office. (R.Vol. IV, 94-94.) The taxi driver did not recall the appearance of either Johnston or Carullo, but did testify that neither had any blood on him. (R.Vol. V, 266.) Johnston testified that he had a few spots of blood on him but that Carullo had none on him. (R.Vol. IV, 97.)

Johnston testified that when they arrived at the loan shop, both Saul Rosen and the defendant Balano were present in the store. (R.Vol. IV, 98.) Balano denied that he was present. (R.Vol. VI, 345.) Johnston testified that Rosen ushered Carullo into an office. (R.Vol. IV, 99.) Rosen then told Johnston to wash the spots of blood off his face. (R.Vol. IV, 99.) When Johnston went into the bathroom he noticed he had some blood on his clothes and, upon returning, asked Rosen if he could change into some clothes from the front of the store; Rosen acquiesced. (R.Vol. IV, 99.) At the time, Balano was in the office with Carullo. (R.Vol. IV, 99.)

About the time Rosen returned from the bathroom, Carullo stepped out of the office and stated that he thought he had been shot in the hip. Carullo then went into the restroom to look at his leg and, according to Johnston, Balano also looked. (R.Vol. IV, 100.) Upon checking, Carullo discovered only a scratch caused by a piece of glass in his leg. He then indicated to Balano that he would like a razor to shave with. (R.Vol. IV, 100.) Balano provided the razor, which Carullo used to shave. (R.Vol.

IV, 101.) Carullo also indicated, in the presence of Rosen and Balano, that he wanted some clothes to change into. (R.Vol. IV, 100.) Rosen responded that the store had a shirt that might fit but no pants. (R.Vol. IV, 101.) Johnston did not testify, however, that any clothes were provided to Carullo.

Bernstein was not present in the store when Carullo and Johnston arrived. (R.Vol. IV, 102.) After shaving, Carullo arranged for him and Johnston to be picked up and taken to a car lot in Independence. (R.Vol. IV, 102-03.) Johnston also testified that Balano and Rosen had both indicated that they did not believe they had enough money in the store to purchase the coins on that day. (R.Vol. IV, 103.) However, he did not testify as to any knowledge that either had or any statement that either made as to the value of the coins.

Before leaving the store, according to Johnston, he and Carullo took a suitcase that was for sale in the store and put the clothes and the coins inside of it. (R.Vol. IV, 103.) However, Johnston's testimony did not tie Balano to the suitcase in any way. He testified only that Rosen took it off the shelf for them without any indication as to the presence of Balano. (R.Vol. IV, 103.) In fact, Johnston himself in answer to a question as to "[w]hat precisely did Mr. Balano do to assist you when you came in there with the coins?" could only respond that Balano "[f]urnished Mr. Carullo with a razor to shave with" and also "allowed us to use the telephone." (R.Vol. V, 223.) Use of the telephone was not mentioned in the indictment. (R.Vol. I, 2.) Finally, Balano, at least according to Johnston, permitted him to pick out clothes to change into. (R.Vol. V, 223.)

Moreover, Johnston did not testify that Balano was in any way aware that the coins had been taken across

a state line. He testified, as previously noted, that Rosen met them when they first came into the store. Rosen asked them how they had gotten to the store and Johnston responded that they had "stashed the car we used in the robbery on the Missouri side of the river, and we took a cab back over here." (R.Vol. IV, 105.) There was no testimony showing that Balano was present during such conversation or otherwise aware of it.

Upon leaving Sol's Loan Office, Johnston and Carullo were driven by a friend of a friend back across the state line to a car lot owned by William Reese. (R.Vol. V, 311.) They sold the coins to Reese on that day for $4,800 (R.Vol. V, 311) and split up the money. (R.Vol. V, 311.)

To buttress its case in the second trial, the prosecution was permitted over the objections of the defendant, to read Carullo's grand jury testimony into evidence. Permitting the prosecution to do so was particularly crucial under the circumstances of this case. As the Court of Appeals noted, "Based on his lengthy legal experience, the district judge expressed 'grave doubts' that Johnston's testimony alone would in fact convince a jury." (Slip Op. at 20 n. 14.) The prejudice to the defendant seems more apparent when the imprecision of Carullo's testimony is considered. He repeatedly referred to the acts or involvement of each. That imprecision was encouraged by the prosecution's use of the same term:

Q. While at Sol's did *they* aid or help you in any way to change your appearance:

A. Yes.

Q. Tell us what *they* did there.

A. Bought a razor so we could shave, and some clothes.

Q. You shaved there?

A. Yes.

Q. Did *they* have a bathroom there?

A. Yes.

Q. And you got new clothes, both of you?

A. Yes.

Q. Did *they* give you anything to carry the coins in?

A. A suitcase. It was blue.

(R.Vol. V, 307-308) (emphasis added).

The prosecution, in fact, made no attempt to differentiate between the acts of Balano and Rosen or to pin down whether Balano was present or participated in any of the transactions in question.

At the first trial, Carullo refused to testify even though he was granted immunity as to the testimony and was subsequently sentenced to six months additional imprisonment for his refusal. (R.Vol. I, 106.) The trial court permitted the prosecution in the second trial to read Carullo's grand jury testimony, finding that Carullo had refused to testify because of a threat on his life made by Balano. (R.Vol. I, 106.) Prior to the second trial, Carullo filed an affidavit stating that he would again refuse to testify for fear of his own family's safety. (R.Vol. I, 106.) At a pretrial hearing on the matter, a government agent testified that Carullo had affirmed the accuracy of his grand jury testimony. (R.Vol. I, 106.) He forgot to note that in the grand jury testimony Carullo was specifically asked about threats and he identified two. One was an *anonymous* phone call to his employer when he was not present. The other was a threat by "someone" at Sol's Loan but *under oath Carullo specifically denied knowing who made the threat.* (R.Vol. II Supp., 45-47.) The agent also related that Carullo had said he had been threatened at his place of employment by Balano. (R.Vol. I, 107.)

However, just before trial, counsel for the defendant Balano provided to the court an unsolicited letter that he had received from Carullo. (R.Vol. IV, 27, Exhibit 1) (text appears in Court of Appeals Slip Op. A11, n. 12.) In the letter, Carullo stated that he did not recall seeing or talking to Balano. (*Id.*) Carullo also stated that he was "under duress and pressure" from the federal government and might have made the statement attributed to him by the government agent "because of mental anguish and . . . pressure." The letter was consistent with Carullo's previous grand jury testimony. (R.Vol. IV, 24.) Nonetheless, the trial court refused to even hold an additional hearing on the matter, finding that it was a matter of "credibility." (R.Vol. IV, 25, 26.)

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Decision Directly Conflicts With Principles Enunciated by This Court in a Long Line of Cases As to Waiver of a Constitutional Right.

This case presents a question that, insofar as Balano's counsel can ascertain, has never been decided directly or indirectly by this Court. The question is the degree and type of proof that must be offered by the prosecution to prove waiver of the right to confront witnesses under the Sixth Amendment when the prosecution claims that the defendant coerced the witness into refusing to testify.

Both the trial court and the Court of Appeals concluded that, absent waiver, the use of prior grand jury testimony of an unavailable witness should be barred by the Confrontation Clause as evidence of a defendant's guilt. (A4.) As the court noted, its decision creates a conflict with the Fourth Circuit, which has permitted use of grand jury testimony after the death of the witness. *United*

States v. West, 574 F.2d 1131 (4th Cir. 1978). *See also United States v. Garner*, 574 F.2d 1141 (4th Cir. 1978), *cert. den.*, 439 U.S. 936, 99 S.Ct. 333, 58 L.Ed.2d 333 (1978). But, as the Court of Appeals in this case noted, such a ruling "improperly reduces the Confrontation Clause to a mere consideration of evidentiary value." (A5.) Moreover, as the Court of Appeals noted, the Fourth Circuit's approach is inconsistent with a long line of this Court's decisions. *See Mattox v. United States*, 156 U.S. 237, 15 S.Ct. 357, 39 L.Ed. 409 (1895); *Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965); *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); *Barber v. Page*, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968); *California v. Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970); *Dutton v. Evans*, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970); *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). That point was forcefully made by Mr. Justice Stewart in dissenting from the denial of the petition for writ of certiorari in *United States v. Garner*. In that dissent, Mr. Justice Stewart specifically referred to a conflict among the circuits and the necessity of a ruling by this Court to define the admissibility of hearsay evidence that does not fall within one of the traditional exceptions. 99 S.Ct. at 335. In any event, the conclusion of the Court of Appeals that Balano's constitutional right to confrontation of the witnesses against him was violated by use of the grand jury testimony, absent waiver, was unquestionably correct. However, the same is not true of its analysis of the waiver issue.

The defendant Balano has no quarrel with the Court of Appeals' determination that constitutional rights, including that to confront witnesses, may be waived. *Lego v. Twomey*, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972); *Brookhart v. Janis*, 384 U.S. 1, 86 S.Ct. 1245, 16

L.Ed.2d 314 (1966). However, the defendant Balano does strenuously object to the test applied by the Court to determine whether a waiver existed and its approach to the trial court's ruling.

In *Brookhart v. Janis*, this Court enunciated the following general principles for determining whether defendant in a criminal trial waived a constitutional right:

> The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law. There is a presumption against the waiver of constitutional rights, *see, e.g., Glasser v. United States*, 315 U.S. 60, 70-71, 62 S.Ct. 457, 86 L.Ed. 680, and for a waiver to be effective it must be clearly established that there was "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461.

384 U.S. at 4. This Court went on to note that "[i]n deciding the federal question of waiver raised here we must, of course, look to the facts which allegedly support the waiver" because "[w]hen constitutional rights turn on the resolution of a factual dispute we are duty bound to make an independent examination of the evidence in the record." 384 U.S. at 4, n. 4. The issue in this case hinged upon a factual dispute. Yet the Court of Appeals entirely failed to independently examine the evidence of record, instead electing to merely defer to the trial court's decision. (A9-12.)

Of even more importance is the fact that the evidence relied upon by both the trial court and the Court of Appeals is entirely insufficient to prove a waiver under the standard adopted by this Court. In *Lego v. Twomey, supra*, this Court dealt with the burden of proof applicable to a determination of the voluntariness of a confession.

This Court determined that the Constitution requires that "the prosecution must prove at least by a preponderance of the evidence that the defendant waived his right to remain silent." 404 U.S. at 489. The Court of Appeals adopted a similar approach, stating that the trial court must "find by a preponderance of the evidence that the defendant's coercion made the witness unavailable." (A10.) The Court of Appeals cited no authority for that statement. It then went on to analyze the matter as if the issue were one of mere evidence as in a civil matter in which the plaintiff must prove his case by the "preponderance of evidence." Although this Court used the same term in *Lego v. Twomey,* the context in which it was used in that and other cases makes clear that the evidentiary standard is entirely different from that in a civil case.

As was pointed out previously, there is a presumption that a defendant did not waive his constitutional rights. That principle is supported by a number of cases. This Court, in fact, has said that "we indulge every reasonable presumption against the waiver of fundamental rights." *Glasser v. United States,* 315 U.S. 60, 70, 62 S.Ct. 457, 86 L.Ed. 680 (1942). *See also Illinois v. Allen,* 397 U.S. 337, 343, 90 S.Ct. 1057, 25 L.Ed.2d 353, *reh. den.,* 398 U.S. 915, 90 S.Ct. 1684, 26 L.Ed.2d 80 (1970). Thus, the evidence of waiver must be sufficient to overcome that presumption. Moreover, the entire burden of proving a waiver of a constitutional right rests upon the prosecution. *See Barker v. Wingo,* 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).

The evidence offered by the prosecution must be more convincing than that which might suffice in a civil trial. This Court stated in *Smith v. United States,* 337 U.S. 137, 69 S.Ct. 1000, 93 L.Ed. 1264 (1949), that a

waiver of constitutional rights "is not lightly to be inferred" and may not rest upon "vague and uncertain evidence." 337 U.S. at 150. "For a waiver of constitutional rights in any context must, at the very *least*, be clear." *Fuentes v. Shevin*, 407 U.S. 67, 95, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972). Thus, a defendant in a criminal trial is "entitled to a reliable and clear-cut determination" of waiver. *Lego v. Twomey, supra*, 404 U.S. at 489.

The evidence in this case hardly meets that standard. As the Court of Appeals noted, Carullo specifically refused to discuss his reasons for refusing to testify. (A10.) The finding of waiver was entirely based on testimony of an FBI agent who claimed that Carullo had said that he would not testify because of threats on his life. Moreover, Carullo's supposed statements to the FBI agent were hardly conclusive as to Balano. One concerned an *anonymous* phone call threatening anyone who testified. The other "threat" was an alleged statement by Balano to the effect that someone might be killed if any statements were made. Although the lower court's opinion refers to "threats" made by Balano, there was absolutely no evidence presented to connect the *anonymous* phone call to Balano. Thus, the question of waiver comes down to a single statement specifically denied by Balano and "proved" by the prosecution only through pure hearsay from the mouth of an FBI agent who had every reason and opportunity to use overt or covert pressure against the witness.

Viewed in that light, a reasonable conclusion that the record supports a finding of waiver by the clear preponderance of evidence is simply impossible. The Court of Appeals, as did the trial court, obviously gave considerable weight to Carullo's statement that his prior grand jury testimony was truthful. The Court, however, overlooked a crucial aspect of that testimony. Carullo was specifically

asked about threats and he identified two. One was an *anonymous* phone call to his employer when he was not present. The other was a threat by "someone" at Sol's Loan but under oath Carullo specifically denied knowing who made the threat. Rather, Carullo's grand jury testimony reflects that "they," meaning someone at Sol's Loan, talked about a sum of $5,000 to have Johnston taken care of. Carullo also indicated that *someone* at the bar where he worked received an *anonymous* phone call to the effect that Carullo's family would be hurt if anyone said anything. There was not any testimony as to who received the call or that the caller was identified as being a man or a woman. In addition, Carullo's grand jury testimony of October 24, 1975 clearly failed to indicate so much as a suggestion of a veiled threat by Balano. Yet, that threat served as the basis on which the trial court and the Court of Appeals found Balano had waived his right of confrontation. (R.Vol. II Supp., 46-47.) In addition, the threat that now serves as the basis for the waiver was revealed by Carullo belatedly and at the time he was incarcerated and then only in an unsworn statement to FBI agent Reuschlein. Yet, in further response to Reuschlein's inquiry, Carullo specifically indicated that his grand jury testimony was true and correct to the best of his knowledge.

Moreover, Carullo later specifically repudiated any such statement to the FBI agent in an unsolicited letter to Balano's attorney. In that letter, Carullo specifically denied even seeing Balano at the bar in question. Yet, the trial court determined that the letter did not mean what it said. The court did so by determining the credibility of Carullo, but not on the basis of his sworn testimony or an unsolicited letter that was entirely consistent with his sworn testimony. The court did so only on the basis of hearsay testimony of an FBI agent. The

defendant submits that it is entirely inappropriate under the required constitutional standard to determine the credibility of such a crucial witness on the basis not of his sworn testimony but on the testimony of an FBI agent.

Thus, the defendant fails to see how it can possibly be said that the preponderance of evidence supports a finding of waiver. A waiver can be found only by disregarding sworn testimony and an unsolicited letter by the witness consistent with that testimony and crediting rank hearsay from the mouth, not of the witness, but of an FBI agent. The defendant submits that under this Court's guidelines Carullo's sworn grand jury testimony, which makes no reference to the threat upon which a finding of waiver is based and which is corroborated by his unsolicited letter to Balano's attorney, clearly outweighs his unsworn statement to the FBI agent, particularly when Carullo has said at all times that his grand jury testimony was truthful. Certiorari should be granted to review a decision with such important ramifications for constitutional principles and the criminal justice system.

II. The Defendant Was Improperly Convicted Without Any Evidence Whatsoever That He Knew That the Underlying Crime Required Under 18 U.S.C. §3 Had Been Committed and Upon Entirely Inadequate Proof and, in Addition, Was Properly Chargeable Only Under 18 U.S.C. §2.

Certiorari should also be granted in this case because it presents important questions in the administration of federal criminal justice. Specifically, it presents issues as to the distinctions between 18 U.S.C. §2 and 18 U.S.C. §3, the degree of scienter required under 18 U.S.C. §3 and the type of acts required for conviction under 18

U.S.C. §3. None of the issues has been directly dealt with by this Court.

Under 18 U.S.C. §2, one who aids and abets a federal offense is punishable as a principal. 18 U.S.C. §3 defines an accessory after the fact as one who assists an offender while "knowing that an offense against the United States has been committed." The offense under that statute is distinct from that committed by an aider and abettor and a different punishment is prescribed. *See Bollenbach v. United States,* 326 U.S. 607, 66 S.Ct. 402, 90 L.Ed. 350 (1946).

Balano was charged as an accessory after the fact under 18 U.S.C. §3. The charge was entirely incorrect because the robbers were still in the escape phase of their crime and had thus not yet completed it. In the context of this crime, an accessory after the fact is generally one who acts as a fence by helping to dispose of the stolen property after the interstate transportation was concluded. *Bollenbach v. United States, supra,* 326 U.S. at 611. The conduct for which Balano was charged and convicted was not even remotely similar.

Of perhaps more importance, however, are the questions concerning the scienter necessary for conviction and the definition of criminal conduct. The statute, 18 U.S.C. §3, clearly states that an accessory after the fact is one who assists an offender while "knowing that an offense against the United States has been committed." The Court of Appeals evaded that clear statutory language by application of the principle that "[w]e do not require the government to prove the defendant's knowledge of jurisdictional elements," citing *United States v. Feola,* 420 U.S. 671, 685, 95 S.Ct. 1255, 43 L.Ed.2d 541 (1975).

But *Feola* is clearly inapplicable. The defendant in *Feola* was convicted of conspiracy to assault a federal

officer. He contended without any statutory support whatsoever that a defendant could not be guilty of conspiracy unless he knew that his conduct violated federal law. The general conspiracy statute, 18 U.S.C. §371, offers no support for that contention. This Court rejected it as inconsistent with the purposes of the law of conspiracy.

In contrast, 18 U.S.C. §3 specifically states that an accessory after the fact is one who "knows" that an offense against the United States has been committed. Such clear and specific language should be given effect. "In the absence of pervasive reasons to the contrary, we attribute to the words of a statute their ordinary meaning." *Banks v. Chicago Grain Trimmers Association,* 390 U.S. 459, 465, 88 S.Ct. 1140, 20 L.Ed.2d 30 (1968). "The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves do not suggest." *Bouie v. Columbia,* 378 U.S. 347, 362-63, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964) (quoting from *United States v. Wiltberger,* 5 Wheat. 76, 96, 5 L.Ed. 37 (1820) (opinion by Marshall, C.J.).)

The uncontroverted evidence in the records shows that Balano did not know that an offense against the United States had been committed. That is, he did not know that the robbers had transported stolen coins valued at $5,000 or more across a state line in violation of 18 U.S.C. §2314.

Neither the trial testimony of Johnston nor the grand jury testimony of Carullo established, in any fashion, that Balano had any knowledge whatsoever of the value of the coins. Carullo specifically stated that the ever present "they" looked at the coins but Carullo could not recall whether "they" placed a price on them. Johnston's testimony contained no reference to anything said or done

that would indicate Balano had any knowledge of the value of the coins.

Moreover, neither witness established that Balano had any knowledge as to whether the coins had been taken across a state line. Carullo's testimony did not refer to anything said or done that would indicate to Balano what had happened. Johnston testified that he had stated, in answer to a question by Saul Rosen, that "we stashed the car we used in the robbery on the Missouri side of the river, and we took a cab back over here." The prosecution, however, made no attempt to place Balano within hearing distance of that statement or to prove in any other manner that he had knowledge of it or of the fact that the coins had been taken into Missouri and back into Kansas. Such evidence is simply not sufficient.

Moreover, the Tenth Circuit's curt dismissal of this claim on the basis that the defendant's knowledge is a mere jurisdictional element does not address the actual issue as set forth in the very case cited by the court in support of its approach, *United States v. Feola*. In that opinion, Mr. Justice Blackmun, speaking for the Court, stated that "[t]he significance of labeling a statutory requirement as 'jurisdictional' is not that the requirement is viewed as outside the scope of the evil Congress intended to forestall, but merely that the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates that act made criminal by the federal statute." 420 U.S. at 676, n. 9. However, he then went on to define the actual issue when the question arises: "The question, then, is not whether the requirement is jurisdictional, *but whether it is jurisdictional only.*" *Id.* (emphasis added). As made clear by the balance of the opinion in that case, the question of whether a statutory element is "jurisdictional only" hinges upon the legislative

intent. And, as was pointed out previously, the legislative intent, when expressed in clear and plain language, is to be given effect according to that language.

The language in 18 U.S.C. §3 is based upon *Skelly v. United States*, 76 F.2d 483 (10th Cir. 1935), *cert. den.*, 295 U.S. 757 (1935), in which the court specifically noted that the concept of accessory after the fact requires knowledge of the substantive offense. See Revisor's Note, 18 U.S.C.A. §3. In this case, the uncontroverted evidence in the record shows that Balano had no knowledge that the substantive offense, interstate transportation of stolen goods valued at more than $5,000, had been committed. The government therefore failed to prove a crucial element of the crime.

Beyond that, the evidence was simply insufficient to support the conviction even if Balano had known of the underlying offense. An accessory after the fact is one who aids an offender "in order to hinder or prevent his apprehension, trial or punishment." 18 U.S.C. §3. The Court of Appeals specifically noted that the evidence against Balano "was circumstantial" and that Balano's actions were "certainly not overwhelming in scope." (A14.) In fact, the prosecution was unable to show that any conduct by Balano materially hindered the apprehension of Johnston and Carullo, the robbers. The sole evidence linking Balano to the underlying offense was the act of providing a razor and a place to shave, but to a man that the victim described as clean shaven. Clothing was supplied by Rosen rather than Balano, according to the testimony of both robbers. Rosen also provided a suitcase to the robbers.

Balano may not be convicted for the acts of his partner. "[G]uilt by association remains a thoroughly discredited doctrine." *Uphaus v. Wyman*, 360 U.S. 72, 79,

79 S.Ct. 1040, 3 L.Ed.2d 1090 (1959). Moreover, the uncontradicted evidence in the record shows that nothing done by Balano, or for that matter Rosen, in any way affected or hindered law enforcement efforts or that Balano had any reason to expect that they would. Section 18 U.S.C. §3 is primarily a codification of long established principles of common law. Under general principles of law, "[m]ere acts of charity which relieve or comfort a felon, but do not hinder his apprehension and conviction or aid his escape, will not render one an accessory after the fact." 22 C.J.S. *Criminal Law* §97, 276. That principle should also be applicable in this instance. Therefore, because of the total inadequacy of the evidence, an inadequacy acknowledged by the Court of Appeals, Balano should not have been convicted and this Court, in exercise of its supervisory capacity over the federal criminal justice system, should grant certiorari to rectify the wrong.

III. The Trial Court Erred by Not Granting Defendant's Motion for Judgment of Acquittal at the Close of the First Trial.

The record reflects that at the close of the first trial of this case, the defendant Balano properly filed a motion for acquittal that raised the question of the sufficiency of the prosecution's evidence. That motion was denied, improperly so, by the trial court. Thereafter, after the second trial, the defendant Balano renewed that motion, which was again overruled by the trial court. The defendant contends that both actions of the trial court were improper and that his conviction should have been reversed on the ground that the government failed as a matter of law to prove its case beyond a reasonable doubt at the first trial.

The trial court properly recognized that its denial of the defendant's motion for a judgment of acquittal

at the close of the first trial was not at that time appealable. *See generally United States v. Kaufman,* 311 F.2d 695 (2nd Cir. 1963). However, the trial court then proceeded to rule that because the defendant had not appealed its order, he could not raise it after the second trial. Such reasoning was fallacious on its face and it was properly criticized by the Court of Appeals. In its opinion, the Court of Appeals noted that a denial of a motion for judgment of acquittal at the end of the first trial was clearly appealable after the second trial because of its double jeopardy ramifications, citing *Abney v. United States,* 431 U.S. 651, 656-62, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977).

Any other conclusion would obviously raise serious double jeopardy implications. In *United States v. Martin Linen Supply Co.,* 430 U.S. 564, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977), this court specifically held that a judgment of acquittal under Fed. R. Crim. P. 29(c), after discharge of a jury that has been unable to agree on a verdict, gave rise to double jeopardy. Similarly, in *Burks v. United States,* 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), and *Greene v. Massey,* 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978), this Court held that the double jeopardy clause precludes a second trial when an appellate court has determined that the evidence introduced at the first trial was insufficient to sustain the verdict. Obviously, the prosecution should not be able to subject a defendant to a second trial when it has wholly failed to prove its case in the first.

As was pointed out previously, the prosecution, to prove its case, was required to introduce convincing evidence that the defendant knew that coins valued at over $5,000.00 had been transported in interstate commerce. As was also pointed out previously, the grand jury testimony of Carullo was totally inconclusive on this point.

At the first trial, the prosecution used Johnston in an attempt to prove that element, as it did in the second trial. Johnston's testimony in the first trial was even weaker than it was the second time. In fact, absolutely nothing in the record of Johnston's testimony of the first trial provides any basis for even a weak inference that the defendant knew of any interstate transportation of the coins.

The transcript of the first trial reflects Johnston's testimony that upon entering the store Carullo was taken into the back office by Balano, Johnston remaining in the front of the store. Rosen then asked Johnston if they had driven the getaway car to the store. Johnston's reply was:

A. No. We ditched it in Missouri and took a cab over here.

Q. Now, could you see what was going on in the back office from where you were?

A. Yes, I could. There was a glass window in the part of the office towards the front of the store.

Q. Did you see what was going on there in the office?

A. The brief case that we had taken from the Mission Coin Shop had been placed on the desk in the office, and Mr. Balano and Mr. Carullo were looking at the coins.

(R.Vol. III, 29-30.)

Thus, the testimony at the first trial totally failed to place Balano in the presence of Rosen and Johnston when any statements were made that would impart notice of knowledge of the interstate transportation of the coins. The Court of Appeals noted that such was the case, conceding that the "new evidence" in the form of Carullo's grand jury testimony "did considerably strengthen the government's position" on the issue. (A17.) However, the

Court of Appeals refused to reverse the conviction, stating that the "government was not required to prove the surplusage of the indictment." *Id.* As is pointed out in section II of this brief, allegations as to the defendant's knowledge of the value of the coins and their interstate transportation are not surplusage in light of the specific statutory language and this Court's holdings. The conclusion of the Court of Appeals is therefore based upon an erroneous premise. The motion for judgment of acquittal should have been granted after the first trial and is now ground for dismissal of the indictment.

IV. The Indictment Did Not Include Any Reference to the Time of the Alleged Offense and Therefore Did Not Allege a Crime.

It is an obvious truism that an indictment must charge an offense within the statute of limitations. There is little question that time is to be treated in most instances as a matter of form rather than substance, assuming that the alleged offense was clearly committed within the applicable limitation period. But, as this Court has long held, if the allegation does not clearly show that the offense occurred within the applicable limitation period, time becomes a substantive element of the offense. *See Ledbetter v. United States,* 170 U.S. 606, 612, 18 S.Ct. 774, 42 L.Ed. 1162 (1898). 18 U.S.C. §3 requires that a defendant be an accessory after the fact to an "offense against the United States." An "offense against the United States" exists only if it is committed within the applicable limitation period, in this instance 18 U.S.C. §3282, and when no time is assigned to the alleged underlying offense the allegation fails to state a public offense. Thus, the issue, in its simplest terms, is whether an indictment may allege a violation of 18 U.S.C. §3 without alleging an offense against the United States. The petitioner submits

that the obvious answer is in the negative and that the indictment in this case should therefore have been dismissed as wholly inadequate.

CONCLUSION

The petitioner believes that after reviewing the foregoing discussion, the members of this Honorable Court will conclude that this is a proper case to determine an issue of constitutional law that has never been directly addressed by this Court. The case also poses questions that go to the very marrow of the criminal justice system. Without doubt, this case raises matters that are not mere technicalities. The petitioner therefore respectfully requests that this Court grant certiorari.

Very respectfully submitted,

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APPENDIX

APPENDIX A

PUBLISH
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 78-1314

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

PHILLIP R. BALANO,
Defendant-Appellant.

(Filed December 18, 1979)

Appeal From the United States District Court
for the District of Kansas
(D.C. Case No. 76-39-CR2)

John C. Humpage, Topeka, Kansas, for Defendant-Appellant.

Edward D. Holmes, Department of Justice (with James P. Buchele, United States Attorney), Kansas City, Missouri, for Plaintiff-Appellee.

Before HOLLOWAY, McKAY and LOGAN, Circuit Judges.

McKAY, Circuit Judge.

Balano has twice been tried, the first trial resulting in a hung jury. Following his conviction on one count of

violating 18 U.S.C. § 3 (1976) as an accessory after the fact to interstate transportation of stolen goods, Balano raises several issues on appeal. His primary contention is that the district court erred in admitting into evidence the grand jury testimony of a convicted participant in the crime, after the witness had refused to testify at trial because of alleged coercion by Balano. Balano also challenges the sufficiency of the evidence to support the conviction, the trial court's refusal to permit the introduction for impeachment purposes of another participant's answer to an interrogatory, the court's refusal to dismiss the indictment at the end of the first trial, and the sufficiency of the indictment. We reject each of Balano's arguments and affirm his conviction.

I.

Balano was originally charged in two of the three counts of an indictment. Count I, which did not name Balano, charged that one Samuel Bernstein aided and abetted Dominick J. Carullo and James E. Johnston in the interstate transportation of stolen coins. The coins were stolen in Kansas, removed to Missouri, and then returned to Kansas. Carullo and Johnston were separately indicted; each pleaded guilty and was sentenced to five years in prison. The fence to whom most of the stolen coins were sold, William Reese, was also separately indicted, and he too pleaded guilty. Following a hung jury in the first trial, Bernstein's case was severed from Balano's. In Count III, Balano and Saul Rosen, his partner in Sol's Loan Office in Kansas City, Kansas, were charged with transporting the stolen goods in interstate commerce. Before submitting the case to the jury, the trial court removed Count III from the indictment because of insufficient evidence.

In Count II, the only count remaining directly in issue on appeal, Balano and Rosen were charged as accessories after the fact for knowingly aiding Carullo and Johnston after the robbery.[1] The trial court denied Balano and Rosen's motion for acquittal at the close of the evidence and, after the jury could not reach a verdict, denied a renewed acquittal motion.[2] At this first trial the government relied almost exclusively on the testimony of Johnston, a participant in the robbery, whose testimony linked Balano marginally, but clearly, with the crimes. The other participant, Carullo, refused to testify even after a grant of immunity. He was cited for contempt and sentenced to an additional six months' imprisonment. Before the second trial Carullo indicated that he would again

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1. In full, Count II reads:

> That on or about the 13th day of April, 1974, in Kansas City, in the State and District of Kansas, PHILLIP R. BALANO and SAUL ROSEN, defendants herein, knowing that Dominick J. Carullo and James E. Johnston, a/k/a Sonny, not named as defendants herein, had transported stolen gold coins of a value over $5,000 from Mission, Kansas, to Kansas City, Missouri, and to Kansas City, Kansas, in violation of Section 2314, Title 18, United States Code, did knowingly relieve, receive, comfort and assist the said Dominick J. Carullo and James E. Johnston, a/k/a Sonny, in order to hinder or prevent their apprehension for trial and punishment; that is to say, the said PHILLIP R. BALANO and SAUL ROSEN, well knowing that Dominick J. Carullo and James E. Johnston, a/k/a Sonny, had transported in interstate commerce stolen goods valued at $5,000 or more as aforementioned, did provide Dominick J. Carullo and James E. Johnston, a/k/a Sonny, new clothing to replace the clothing used in the above-mentioned crime, did provide Dominick J. Carullo shaving equipment and lavatory facilities in order for the said Carullo to shave off his mustache and beard, and did provide Dominick J. Carullo and James E. Johnston, a/k/a Sonny, a suitcase in which to hide the stolen gold coins, all for the purpose of aiding and assisting the said Dominick J. Carullo and James E. Johnston, a/k/a Sonny, to escape apprehension for trial and punishment.
>
> All in violation of Title 18, United States Code, Section 3. Record, vol. 1, at 1-2.

2. Because Rosen died before the commencement of the second trial, the indictment against him was dismissed.

refuse to testify. After an evidentiary hearing, the court permitted the introduction of Carullo's grand jury testimony, which tied Balano more closely to the criminal scheme. Balano was convicted, his acquittal motions were denied, and this appeal resulted.

II.

On both statutory and constitutional grounds, Balano challenges the admission of Carullo's grand jury testimony. Balano first questions the trial court's finding that the necessary requirements were present to justify admission of the hearsay evidence under Fed. R. Evid. 804(b)(5). Even if statutory justification for admission did exist, however, Balano charges that the admission of the grand jury evidence in this case denied him his constitutional right "to be confronted with the witnesses against him." U. S. Const. amend. VI.

The trial court agreed that, absent waiver, the prior grand jury testimony of an unavailable witness should be inadmissible as evidence of a defendant's guilt. However, the court held that Balano had effectively waived his right to confront Carullo by threatening his life. Although we will not lightly accept findings of waiver of the constitutional right of confrontation, we hold that the trial court's careful consideration of the evidence of coercion justified its finding in this case. Because we find a waiver of confrontation rights, we need not consider whether the testimony met the standards for admission under Rule 804(b)(5). A valid waiver of the constitutional right is *a fortiori* a valid waiver of an objection under the rules of evidence.

A.[3]

We must reach the waiver question because we find that, absent waiver, Balano's Confrontation Clause rights

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3. Part II.A. reflects the analysis of Judge McKay only.

were violated. In its Memorandum and Order, the trial court correctly stated that, at the time, "[e]ven with . . . indicia of reliability, it appears no Court has been willing, without more, to sanction use of an unavailable witness' grand jury testimony as substantive evidence at trial to reflect upon a defendant's guilt." Record, vol. 1, at 108. *See United States v. Carlson,* 547 F.2d 1346, 1357 (8th Cir. 1976), *cert. denied,* 431 U.S. 914 (1977); *United States v. Fiore,* 443 F.2d 112, 115 (2d Cir. 1971). Because of *United States v. West,* 574 F.2d 1131 (4th Cir. 1978), the district court's statement is no longer correct. In *West,* the Fourth Circuit permitted introduction of grand jury testimony (after the death of the witness) because of strong guarantees of the testimony's reliability. *See also United States v. Garner,* 574 F.2d 1141 (4th Cir.), *cert. denied,* 439 U.S. 936 (1978). We believe, however, that *West* improperly reduces the Confrontation Clause to a mere consideration of evidentiary value.

The *West* court recognized that the Confrontation Clause and the historical hearsay rules are not congruent. The Supreme Court has "more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception." *California v. Green,* 399 U.S. 149, 155-56 (1970), *citing Barber v. Page,* 390 U.S. 719 (1968); *Pointer v. Texas,* 380 U.S. 400 (1965). *See also United States v. Roberts,* 583 F.2d 1173, 1176 (10th Cir. 1978), *cert. denied,* 439 U.S. 1080 (1979). Although "the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots . . . [the Supreme] Court has never equated the two." *Dutton v. Evans,* 400 U.S. 74, 86 (1970). Despite its recognition of these differences, however, the Fourth Circuit found that "the same circumstances suffice to meet the

requirements of [Rule] 804(b)(5) and of the Confrontation Clause." 574 F.2d at 1138. We disagree.[4]

The Confrontation Clause is not concerned only with the inherent veracity of hearsay statements. "[W]e should not be lured by the possible reliability of out-of-court statements, important as that is in the consideration of the problem as a rule of evidence, away from the ultimate constitutional prescription [of the Confrontation Clause], which is the regulation of trial procedure." *United States v. West*, 574 F.2d at 1139 (Widener, J., dissenting). The Clause was aimed at "the particular vice . . . of trying defendants on 'evidence' which consisted solely of *ex parte* affidavits or depositions secured by the examining magistrates." *California v. Green*, 399 U.S. 149, 156 (1970). The Clause is directed not primarily at content but at "compelling [the witness] to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox v. United States*, 156 U.S. 237, 242-43 (1895). Under these standards, Carullo's grand jury testimony fails to satisfy the requirements of the Confrontation Clause. It is the equivalent of an *ex parte* deposition, it was not redeemed by a court appearance of Carullo, and it was secured through a procedure that has become the arm of the "examining magistrate."[5]

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4. We recognize that the Supreme Court has appeared to give overriding significance to "indicia of reliability." *See* Mancusi v. Stubbs, 408 U.S. 204 (1972). In *Mancusi*, however, the hearsay statements came from testimony at an earlier trial, and the determinative indicium of reliability was an "adequate opportunity to cross-examine" at that earlier trial. *Id.* at 216.

5. In characterizing grand jury testimony for Confrontation Clause purposes, we should recognize that grand juries have largely lost their function as protectors of individual rights and have become agents of the prosecution. *See* M. Frankel & G. Naftalis, *The Grand Jury: An Institution on Trial* 99-102 (1977). If we were to ignore this reality in our analysis, we would be using a fictional protection of individual rights as an excuse to remove the actual protections of the Confrontation Clause.

We do not mean to elevate cross-examination, under all circumstances, to the level of a constitutional requirement. Read narrowly, the Confrontation Clause would altogether preclude the use of hearsay evidence in criminal trials unless the hearsay declarant was available for cross-examination. No major American court has gone so far, *see Dutton v. Evans*, 400 U.S. at 82, and we certainly do not. We can also agree with the Fourth Circuit that "[t]he Supreme Court has never intimated . . . that cross-examination is the only means by which prior recorded testimony may be qualified for admission under the Confrontation Clause." *United States v. West*, 574 F.2d at 1137. *See United States v. Roberts*, 583 F.2d 1173, 1176-77 (10th Cir. 1978), *cert. denied*, 439 U.S. 1080 (1979) (co-conspirator exception to hearsay rule). Nevertheless, the Supreme Court has placed great emphasis on cross-examination—whether at the instant trial or at another trial or hearing—as a protector of confrontation values. "[The Court's] cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination." *Davis v. Alaska*, 415 U.S. 308, 315 (1974), *quoting Douglas v. Alabama*, 380 U.S. 415, 418 (1965). *See also California v. Green*, 399 U.S. 149, 158 (1970); *Bruton v. United States*, 391 U.S. 123, 126 (1968); *Barber v. Page*, 390 U.S. 719, 725 (1968); *Brookhart v. Janis*, 384 U.S. 1, 4 (1966); *Pointer v. Texas*, 380 U.S. 400, 404 (1965). When the hearsay evidence is grand jury testimony—that is, when the prosecution itself has secured the hearsay testimony—we are unwilling to dispense with cross-examination as a required element of confrontation.[6]

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6. Under no circumstances, including coercive acts by a defendant, should cross-examination of an *available* witness not be constitutionally mandated. *See* United States v. Mathis, 559 F.2d 294 (5th Cir. 1977). In *Mathis*, a threatened witness did not testify although she had "explicitly stated that if she was ordered to testify, she would not refuse to do so." *Id.* at 293. The

(Continued on following page)

Cross-examination in the instant case would have been particularly important because much of the damaging grand jury testimony—questions as well as answers—referred to an indefinite "they" performing the illegal acts. "They" apparently were Rosen and Balano. Because Carullo's testimony placed Balano in situations that Johnston's testimony had not,[7] however, Balano plausibly argues that cross-examination was necessary to ferret out the alleged respective acts of Rosen and Balano.

B.

Although confrontation values are of constitutional magnitude, they may, of course, be waived. *See Brookhart v. Janis*, 384 U.S. 1, 4 (1966). We must determine whether threats by a defendant on a witness' life may constitute a waiver. We must also decide whether the evidence of such threats was, in this case, sufficient to warrant the judge's determination that coercion existed. We answer both questions affirmatively.

In *United States v. Carlson*, 547 F.2d 1346 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977), the Eighth Circuit held that "if the witness's refusal to testify was procured by the accused, no confrontation rights are denied." 547 F.2d at 1358. In *Carlson*, a government witness refused to

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Footnote continued—

Fifth Circuit found her to be an available witness under the evidence rules, and held that statements made by her to government agents were inadmissible hearsay. Her live testimony would have been "more probative on the point for which it [was] offered." Fed. R. Evid. 803(24). Although the court did not reach the Sixth Amendment issue, it did express "grave doubts" that those rights were not violated. 559 F.2d at 299.

7. For example, Johnston testified that *Rosen* had gotten clothing for Carullo and Johnston. Record, vol. 3, at 32; vol. 5, at 223. Carullo's testimony attributed the clothing to "they." Record, vol. 5, at 307. Johnston specified that Rosen had provided a suitcase for the robbers. Record, vol. 5, at 223. Carullo, however, referred again to "they." Record, vol. 5, at 308.

testify because, as he intimated to government agents, he had received threats from the defendant. The district court heard testimony from the agents to whom the witness had spoken and found that the defendant had indeed made the witness unavailable for trial.[8] The Eighth Circuit noted:

> [T]he law [should not] permit an accused to subvert a criminal prosecution by causing witnesses not to testify at trial who have, at the pretrial stage, disclosed information which is inculpatory to the accused. To permit the defendant to profit from such conduct would be contrary to public policy, common sense and the underlying purpose of the confrontation clause.

Id. at 1359. We agree that, under the common law principle that one should not profit by his own wrong, coercion can constitute voluntary waiver of the right of confrontation.[9]

We also believe that the trial court had before it sufficient evidence to justify its finding of coercion. We recognize that often the only evidence of coercion will be the statement of the coerced person, as repeated by government agents. Consequently, a reasonable doubt standard for admission might well preclude a finding of waiver, no matter how reprehensible the defendant's conduct. On the other hand, we do not wish to emasculate the Confrontation Clause merely to facilitate government prosecutions.

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8. The agent also testified that the witness had reiterated the truthfulness of his grand jury testimony. 547 F.2d at 1353.

9. United States v. Mathis, 559 F.2d 294 (5th Cir. 1977), discussed at note 6 *supra*, contains language that Balano believes supports his position: "[O]ur law provides methods to alleviate these deplorable practices [intimidation of witnesses] other than through interpretations of evidentiary rules which may seem to be fair in a particular case yet establish an impermissible legal precedent for subsequent cases." *Id.* at 299-300. However, since the intimidated witness in *Mathis* was an "available" witness, the waiver issue was not addressed.

Thus, a prima facie showing of coercion is not enough. We hold, therefore, that before permitting the admission of grand jury testimony of witnesses who will not appear at trial because of the defendant's alleged coercion, the judge must hold an evidentiary hearing in the absence of the jury and find by a preponderance of the evidence that the defendant's coercion made the witness unavailable.

The district court's determination in this case followed a careful, thoughtful hearing, and was supported by sufficient evidence. The district judge noted, prior to receiving evidence at the hearing, that the government would be required "to satisfy the Court that threats imminented [*sic*] from the defendants to the witness 'shutting his mouth' so to speak." Record, vol. 8, at 9-10. To that purpose, he heard testimony first from Carullo himself who, although he would not discuss his reasons for refusing to testify at Balano's trial, reiterated that his grand jury testimony was truthful and that he had previously so told a government agent.[10] *Id.* at 23, 25. FBI agent Reuschlein then testified in detail about his various meetings with Carullo. Reuschlein testified that at an interview in April 1976 (following the grand jury testimony and Carullo's imprisonment), Carullo stated "that there had been different threats made, and for fear, and the fact that he was recently married, and was a resident of the City . . ., and that he wanted to continue to live in that area," he would not testify. *Id.* at 32-33. In talking with Reuschlein, Carullo mentioned two specific threats. First, an employee at his uncle's bar received a phone call to the effect that "if anybody testified in the matter . . ., they could be killed." *Id.* at 33. Second, on an occasion when

10. Under our analysis, based on waiver, we are not relying on Carullo's failure to repudiate his grand jury testimony as an indicium of reliability that itself justifies admission. However, Carullo's consistency could reasonably have led the trial court to give greater weight to Carullo's statements about coercion.

Carullo was working at another bar, Pat O'Brien's, Balano himself came in and said, "Well, you know, we could get somebody killed if any statements were made regarding the matter."[11] Agent Reuschlein's notes, made at the time of the interview, confirmed his testimony. *Id.* at 34-36.

As a result of the evidence of threats made by Balano, the district court concluded that Balano had waived his right to confrontation and properly ruled that the Carullo grand jury testimony was admissible against Balano but not against the other defendants. Record, vol. 1, at 109.

At the beginning of the second trial, Balano's attorney produced a letter written to him by Carullo. In the letter Carullo indicated that he did not remember seeing Balano at Pat O'Brien's and attributed his earlier statements to governmental pressure.[12] The district court determined that this letter affected only the question of credibility, which he as the fact-finder for admissibility purposes had to resolve. The court felt that the letter showed that

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11. Balano suggests that this threat was "obviously extremely ambiguous." Reply Brief for Appellant at 13. In discussing the possible meanings the statement could have, however, Balano provides only examples that would give pause to any reasonable person who is considering testifying. *Id.* We do not see any ambiguity in intended effect.

12. The body of the letter addressed to Balano's attorney reads:

> I want to clarify a statement I made more than two years ago, When I was under duress and pressure of the Federal Government, And at a time when I was personally involved in serious litigation.
>
> It is possible that because of mental anguish and severe pressure at the time, That I may have said I was with Phil Balando [*sic*] at Pat O'Briens, but I do not remember seeing him or talking to him.
>
> In a very short time I will be able to return home, And have but one desire, to live quietly, And peacefully, with my wife as we try to catch up three lost years in our lives. In no way do I wish to be involved in any thing that will cause trouble for anyone.

Record, vol. 2, at 342.

Carullo was scared and was saying, in essence, "I just don't want to cause trouble for anyone." Carullo, that is, might well have come to realize that his grand jury testimony, which he did not repudiate, was likely to be admitted and that his life was therefore still in danger. Record, vol. 4, at 21-22. Because of the evidence he had at his disposal in making this determination, we cannot say that the district judge's resolution was error.

III.

In challenging the sufficiency of the evidence to support his conviction, Balano urges that the government did not prove the existence of an underlying offense against the United States, Balano's knowledge of that offense or any criminally liable assistance by Balano. Any of these failures of proof would require reversal. However, viewing the evidence in a light most favorable to the government, as we must on appeal, we reject these contentions.

The applicable accessory statute requires that the defendant act "knowing that an offense against the United States has been committed." 18 U.S.C. § 3 (1976). The indictment itself contained greater specificity, alleging that Balano had acted "well knowing that [Carullo and Johnston] had transported in interstate commerce stolen goods valued at $5,000 or more." Record, vol. 1, at 2. Balano charges that his knowledge of neither the fact of interstate transfer of the coins nor of the coins' value was proven. He further argues that the accessory after the fact charge requires proof of the completion of the underlying crime but that trial evidence "showed conclusively that Carullo and Johnston were still in the escape phase of their crime and had thus not yet completed it." Brief for Appellant at 38. Thus, Balano argues, he should have been charged, if at all, as an aider and abettor under 18 U.S.C. § 2 (1976).

This court has held that the prosecution need not prove elements of an indictment that are mere surplusage. *See United States v. Archer,* 455 F.2d 193, 194 (10th Cir.), *cert. denied,* 409 U.S. 856 (1972). The coins' value and their interstate transmission do not affect the existence of the underlying crime, but merely the existence of federal jurisdiction. We do not require the government to prove the defendant's knowledge of jurisdictional elements. *See United States v. Feola,* 420 U.S. 671, 685 (1975); *United States v. Hobson,* 519 F.2d 765, 769-70 (9th Cir.), *cert. denied,* 423 U.S. 931 (1975); *United States v. Smaldone,* 485 F.2d 1333, 1348-49 (10th Cir. 1973), *cert. denied,* 416 U.S. 936 (1974). Evidence was certainly admitted from which the jury could infer that Balano knew of the existence of an underlying crime.

We note further that the district court instructed that the jury must find knowledge of the jurisdictional elements, Record, vol. 2, at 275, and the jury apparently so found. Johnston testified that he personally told Balano that Carullo and he had robbed the Mission Coin Shop. Record, vol. 4, at 105. Johnston also testified that, with Balano present, he said that the getaway car had been ditched on the Missouri side of the river. *Id.* Finally, Carullo's grand jury testimony indicated that Johnston and Carullo informed Rosen and Balano of the robbery and that the robbers wanted $12,000 for the coins. Record, vol. 5, at 306. Hence, even under the heightened standards set by the instructions to the jury, we cannot say that the verdict was an unreasonable one.

Balano's argument that Carullo and Johnston were still in the escape phase of their crime when they reached the loan office is similarly without merit. There is no doubt that one who assists in an escape should be charged under 18 U.S.C. § 2 rather than 18 U.S.C. § 3. *See United*

States v. Willis, 559 F.2d 443 (5th Cir. 1977); *United States v. Barlow*, 470 F.2d 1245, 1252-54 (D.C. Cir. 1972); *United States v. Von Roeder*, 435 F.2d 1004, 1010 (10th Cir. 1970). It is not necessary, however for the principals to have come to a final resting place for the escape to have ended. The escape phase doctrine was developed to deal with those who are entangled in the consummation of the crime itself, such as getaway car drivers. In contrast, accessories after the fact "[obstruct] justice by rendering assistance to hinder or prevent the arrest of the offender after he has committed the crime." *United States v. Barlow*, 470 F.2d at 1253.

Carullo and Johnston crossed the state line again after leaving Sol's Loan Office, and the sale of the coins took place shortly thereafter. However, sufficient evidence was admitted at Balano's trial to permit the jury to infer that Carullo and Johnston had made prior arrangements to "fence" the coins at Sol's. *E.g.*, Record, vol. 4, at 81-87. Although they did not ultimately fence the coins there, a finding that the events at Sol's were beyond the escape phase is entirely consistent with the testimony of Carullo and Johnston. The getaway car had been abandoned, and no more furtive action was taken. We cannot consider an escape to continue until an ultimate buyer is found. The court's dismissal of the third count, based on 18 U.S.C. § 2, at the end of the first trial was therefore proper, and we cannot say the submission of the second count to the jury was improper.

Although his actions were certainly not overwhelming in scope, even as charged, we also cannot accept Balano's contention that he did not assist Carullo and Johnston so as to hinder their apprehension, trial or punishment. Balano argues that the evidence linked him only to the provision of a razor for Carullo and that further evidence

showed Carullo to have been cleanshaven at the time. Brief for Appellant at 42. However, other evidence suggested that Carullo had both long, heavy sideburns and several days' growth of beard. *E.g.*, Record, vol. 5, at 176. If so, provision of the razor aided a change of appearance, as Carullo's grand jury testimony indicated. Record, vol. 5, at 307. Indeed, we would expect the razor to have served some purpose. Furthermore, although the evidence other than Carullo's equivocal grand jury testimony was circumstantial, it was sufficient to permit the jury to infer that Balano participated in the other actions alleged in the indictment: providing clothes, a suitcase and use of the bathroom. Johnston testified that Balano was given two gold coins to reward him for his efforts. Record, vol. 4, at 104; vol. 5, at 200. Therefore, we cannot agree, as Balano suggests, that his actions were "mere acts of charity," which did not hinder the apprehension of Carullo and Johnston. Brief for Appellant at 43.

IV.

The trial judge determined that Reese, the purchaser of the stolen coins, was unavailable because of illness and directed him to answer a set of interrogatories. Nearly all of the answers were admitted into evidence. Balano charges as error the court's refusal to permit the admission of one particular answer, which he asserts was vital to the impeachment of Johnston's testimony. We find, however, no abuse of the trial court's discretion.

Johnston testified that of the 110 stolen coins, 106 were sold to Reese and four were given to Rosen and Balano. Record, vol. 5, at 198. As part of the disputed interrogatory answer, Reese appended a portion of his own grand jury testimony, Record, vol. 2, at 260-61, in which he quoted one Richard Ratty as saying, three months after the robbery, "[Johnston] told me that he had some gold

coins to sell." Although Ratty would not say whether he had personally purchased any of the coins from Johnston, the conversation led Reese to conclude that he had not purchased all of the stolen coins, Reese said: "I don't think I got them all." *Id.* at 261. Balano contends that the Reese answer undercuts Johnston's testimony concerning the disposition of the coins and that "[e]vidence bearing on the credibility of an important witness is never collateral or irrelevant." Brief for Appellant at 44. Balano further argues that, because Reese was unavailable as a witness, "the defense had no other means to bring the evidence to light." *Id.* at 45. The trial judge, however, excluded the grand jury testimony on grounds of hearsay and lack of relevance. Record, vol. 6, at 467-68.

We cannot agree that the trial judge abused his discretion in excluding the answer. Particularly given the three month intervening period, the statements of Ratty were at best tangentially related to any issue at trial, including the credibility of Johnston. Moreover, another source of the evidence was apparently available. We must assume from the record before us that Ratty himself was available to testify; the government attorney so stated at trial, and Balano's attorney did not contradict him. Record, vol. 6, at 468. We cannot accept Balano's professed belief in the critical nature of the evidence when he did not take the most obvious step to secure that evidence.

V.

Balano argues that the trial judge was required to grant the motion for judgment of acquittal at the end of the first trial and that, as a result, his conviction is barred under double jeopardy standards.[13] Balano's contention is

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13. The denial of the motion was not appealable at the end of the first trial. *See* United States v. Kaufman, 311 F.2d 695 (2d Cir. 1963). Because of its double jeopardy ramifications, that denial is now clearly appealable. *See* Abney v. United States, 431 U.S. 651, 656-62 (1977).

based on the premise that only Carullo's grand jury testimony, not used in the first trial, and certain changed aspects of Johnston's testimony at the second trial made the conviction possible and, without that evidence, acquittal was mandated. We disagree.

The argument has plausibility only because of Balano's belief that knowledge of jurisdictional elements in the indictment must be proven. The new evidence did considerably strengthen the government's position on these issues. However, as we noted in Part III, *supra*, the government was not required to prove the surplusage of the indictment. Because there was other evidence sufficient to support a conviction,[14] the district judge did not abuse his discretion in denying the motion, and the double jeopardy issue is not reached.

VI.

Finally, Balano argues that the indictment did not state a public offense because it did not sufficiently plead the existence of an underlying offense against the United States. The alleged deficiency lies in the failure of the indictment to allege affirmatively that the underlying crime was not barred by the statute of limitations. Furthermore, since an accessory after the fact violation presupposes the completion of an underlying crime, Balano argues that the date of that crime must be pleaded in order to show the proper ordering of events. We find these arguments to be without merit.

The statute in question, 18 U.S.C. § 3 (1976), does require an underlying federal crime. By its terms, however,

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14. Based on his lengthy legal experience, the district judge expressed "grave doubts" that Johnston's testimony alone would in fact convince a jury. He correctly decided, however, that he should not invade the jury's fact-finding realm because a jury could convict on the basis of Johnston's testimony. Record, vol. 1, at 33.

it does not require that the date of that crime be pleaded. Indeed, since the acts of an accessory occur *after the fact,* it is conceivable that the limitation period for an underlying crime could run while the accessory offense remains prosecutable. We believe that the accessory statute requires only the commission of an offense against the United States, not that the offense be prosecutable or actually prosecuted. Furthermore, the indictment clearly required proof that Balano knew of the underlying offense. For the government to provide that proof, as it did, the underlying offense must have been completed. No greater showing of proof ordering was necessary.

Balano incorrectly relies on *United States v. Gammill,* 421 F.2d 185 (10th Cir. 1970), in which the year of the offense was omitted from the indictment. The indictment therefore did not charge criminal conduct committed within the applicable limitation period. *Id.* at 186. No such problem exists in the instant case.

AFFIRMED.

No. 78-1314 - UNITED STATES OF AMERICA
v. PHILLIP R. BALANO

HOLLOWAY and LOGAN, Circuit Judges, concurring:

We concur in everything stated in the opinion in this case except the discussion of the confrontation clause rights in Part II.A. of Judge McKay's opinion. We neither agree nor disagree with the discussion of those confrontation clause rights and *United States v. West,* 574 F.2d 1131 (4th Cir. 1978). We do not have to reach the point discussed there because if Balano had such rights they were waived, as the trial judge found and as this opinion affirms. We would prefer to wait until we have a case which requires a decision on that issue.

APPENDIX B

MAY TERM - May 20, 1980

Before Honorable Oliver Seth, Chief Judge, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan and Honorable Stephanie K. Seymour, Circuit Judges

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No. 78-1314

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

PHILLIP R. BALANO,
Defendant-Appellant.

This matter comes on for consideration of the petition for rehearing and suggestion for rehearing en banc filed by the appellant in the captioned case.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judges Holloway, McKay and Logan, to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35 Federal Rlues of Appellate Procedure, the suggestion for renearing en banc is denied.

Howard K. Phillips,
Clerk

/s/ Robert L. Hoecker

By: Robert L. Hoecker
Chief Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

No. 76-39-CR2

UNITED STATES OF AMERICA,
Plaintiff,

vs.

SAMUEL BERNSTEIN, PHILLIP BALANO
and SAUL ROSEN,
Defendants.

MEMORANDUM AND ORDER

(Filed May 31, 1977)

This matter comes on after hearing upon defendants' objection to the government's Notice of Intent to offer at trial the grand jury testimony of Dominick J. Carullo if Carullo proves unavailable to testify at trial. The government has reason to believe Carullo will be unavailable at trial in that he refused to testify at the first trial upon this matter even though he was granted immunity as to such testimony and was sentenced to six months additional imprisonment for his subsequent refusal. Carullo filed with the Court prior to this hearing an affidavit stating he will again refuse to testify for fear of his own and his family's safety. At hearing upon this matter Carullo did once again refuse to testify as to the matter contained in his grand jury testimony.

The United States alleges Carullo's testimony is necessary to its case against defendants in that Carullo alone

can testify as to some alleged dealings with defendants, and in other matters it bolsters the trial testimony of the only testifying alleged co-conspirator, Johnston. At hearing F.B.I. Special Agent Reuschlein testified he showed Carullo a copy of his October 24, 1975 grand jury testimony on April 6, 1976, and asked him if such statement was true and correct. Carullo replied affirmatively. Reuschlein also informed Carullo he might be required to testify to the same matters at trial. Carullo indicated he would not testify because he feared for his life if he did so. One specific threat Carullo related to Reuschlein was made to him by defendant Balano who came to Carullo's place of employment, asked if Carullo or Johnston had talked to the F.B.I., and said to Carullo, "Well you know we could get somebody killed if any statements were made regarding the matter."

Defendants contest the admissibility of the grand jury statement upon several grounds. They allege it is not more probative than a trial statement by Johnston, is not trustworthy, and will not serve the interests of justice. See, Federal Rules of Evidence 803(24), and 804(b)(5). Defendants allege Carullo's April 6, 1976 statement to Reuschlein contradicts an earlier grand jury statement as to an incident wherein someone approached Carullo and offered money for him to "take care of" Johnston.

The Court finds no contradiction in Carullo's statements relating various threats made to him concerning his own, his family's or Johnston's safety should Carullo or Johnston talk the the authorities. Furthermore, from evidence and testimony at the hearing the Court finds one specific threat motivating Carullo to refuse to testify at trial to be that made to him at his place of employment by defendant Balano. The Court also finds Carullo's grand jury testimony made under oath, the truth of which he has never refuted, to have every indicia of credibility. The

Court finds such statement by Carullo to be the most probative evidence as to material facts stated therein of any other evidence the United States can procure.

The Court has no doubt that Carullo is "unavailable" under Federal Rules of Evidence 804(a)(2) in that he "persists in refusing to testify concerning the subject matter of his statement despite an order of the Court to do so." Notice was also given to defendants of the government's intent to use Carullo's prior grand jury testimony well in advance of its proposed use as required by Rule 804(b)(5).

Defendants contend their constitutional rights of confrontation will be violated should testimony elicited from Carullo through the government's questioning at a time when defendants had no right to confront or cross-examine him be presented at trial as substantive evidence. This is an issue viewed seriously by the Court in that the right to confrontation and cross-examination, although not without exception, is a basic constitutional right. Any exceptions to such right when a witness is unavailable but has made a prior statement are considered on a case-by-case basis and the focus of the Courts' concern has been to insure that there are indicia of reliability such that the trier of fact has a satisfactory basis for evaluating the truth of the prior statement. *Mancusi v. Stubbs*, 408 U.S. 204, 213, 92 S.Ct. 2308, 33 L.Ed.2d 292 (1972). Even with such indicia of reliability, it appears no Court has been willing, without more, to sanction use of an unavailable witness' grand jury testimony as substantive evidence at trial to reflect upon a defendant's guilt. This Court shares the view that an unavailable witness' grand jury testimony should not be admissible as substantive evidence of a defendant's guilt without some act or statement on the defendant's part evidencing a waiver of the right to confrontation and cross-examination.

The Sixth Amendment right of confrontation is a personal right of the accused, intended for his benefit, and as such can be waived by the defendant. *United States v. Carlson,* No. 76-1363 (8th Cir., Dec. 19, 1976). A defendant who, through threats or actual physical harm, procures the "unavailability" of a potential witness against him cannot be permitted to derive benefit from such conduct.

When a defendant, through his own wrongful acts, causes the unavailability of a witness who has testified previously in a pretrial proceeding, then such defendant actively waives his right to confront the witness at trial. *United States v. Carlson,* supra. If the pretrial testimony is found by the Court to fulfill the truthfulness and necessity requirements of Rule 804(b)(5), then such is admissible at trial as against that defendant. In this case defendant Balano, through his threat to Carullo, created the situation of Carullo's unavailability to testify at trial. Such action by Balano constituted effective waiver of his right to confront and cross-examine Carullo as to statements made by Carullo to the grand jury.

Defendants Bernstein and Rosen were neither alleged nor shown to have made nor caused to be made any threats to Carullo. They have not waived their right to confront and cross-examine Carullo, and therefore Carullo's grand jury statements are not admissible and would be prejudicial as to them.

For the above reasons, the Court finds Carullo's grand jury testimony is admissible as substantive evidence of guilt in a criminal trial against Balano alone as a severed defendant. Such testimony, without the opportunity for confrontation and cross-examination, and without waiver of such right, is not admissible in this trial against defendants Bernstein and Rosen. Nor would it be admissible in a joint trial of Bernstein, Rosen and Balano against Balano

alone under a limiting court instruction because of the danger of either possible disregard of the instruction by some juror, or prejudice to the remaining two because of association with Balano as co-defendant.

IT IS SO ORDERED at Wichita, Kansas, this 27th day of May, 1977.

/s/ Frank G. Theis
United States District Judge